Office Supreme Court, U.S.
FILED
AUG 9 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 312

In the Matter of the Application of
DR. DAVID WASSERMANN,
Appellant,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Appellee.

On Appeal from a Judgment of the New York State Court of Appeals

APPELLANT'S JURISDICTIONAL STATEMENT

JACOB RASSNER,
Counsel for Appellant,
Office & P. O. Address,
15 Park Row,
New York 38, N. Y.
BArclay 7-2618

INDEX

	PAGE
Opinions Below	2
Grounds for Jurisdiction	3
Laws Involved	4
Questions Presented	5
A. Appealable Questions	5
B. Non-appealable Questions	6
Statement	8
Substantial Federal Questions Are Raised Herein	18
A. Appealable Questions	18
POINT I—Education Law, sections 211 (subd. 1), 6514 (subd. 2(a) and 2(g)) and 6515 are repugnant to the 14th Amendment to the Constitution of the United States, and the decision of the court below, sustaining their validity, deprives appellant of due process, denies him the equal protection of the laws and raises a substantial federal question for this Court to review ?	18
A. Subd. 2(a) and 2(g) of Education Law, Section 6514 are disciplinary statutes imposing penalties and punishment, and must be strictly construed as penal statutes	18
B. Subd. 2(a) and 2(g) are vague, indefinite, undefined, lack intelligible or ascertainable standards and are repugnant to the 14th Amendment	21
C. Subd. 2(a) and 2(g) unconstitutionally delegate the power to set standards and define offenses and are repugnant to the constitution by reason of such delegation	23

PAGE

D. Subdivision 2(g) is a constitutionally prohibited ex post facto law and was applied retroactively against appellant 24

POINT II—Section 6515 of the New York State Education Law is invalid as it is repugnant to the Constitution of the United States 28

A. Section 6515 unconstitutionally delegates an unfettered discretion to appellee 28

B. Section 6515 unconstitutionally fails to set a recognizable or intelligible standard for the quantum of evidence to guide appellee's hearing committee 30

C. Section 6515 unconstitutionally authorized a hearing tribunal lacking essential requirements of constitutionality 30

POINT III—Non-appealable questions are presented on this appeal under the authority of this Court's prior decisions 34

A. Appellant was deprived of due process and denied the equal protection of the law in violation of the Fourteenth Amendment 34

(1) The courts below and appellee's committees were deceived by false evidence 34

(2) Retrospective application of subd. 2(g) violated appellant's constitutional rights 35

(3) The finding of guilt without probative or substantive evidence to support it violates appellant's constitutional rights 36

PAGE

(4) Appellee's hearing tribunal violated the constitutional requirements of an impartial and unprejudiced forum, free from passion, hysteria and other unconstitutional motivation 39

(5) Appellant was unconstitutionally denied a remedy by the court below 40

(6) Appellant was denied the equal protection of the laws by appellee's unusually severe punishment 41

(7) Appellant was deprived of the aid of counsel and compelled to testify against himself in a criminal investigation and the fruits of such illegal compulsion were used against him in violation of appellant's constitutional right to due process and the equal protection of the laws .. 42

(8) Appellee's findings violated prohibition against double punishment, therefore denying appellant the equal protection of the laws and depriving him of due process 43

(9) Appellee's failure to comply with statutory requirements deprived appellant of due process and denied him the equal protection of the laws 43

a. Lack of unanimous vote 43

b. Proceedings and determination of illegally constituted committee are void 44

PAGE

c. Attorney General's determination to prosecute nullifies proceedings 45

(10) Due process is lacking where, as here, the one who decides did not hear the evidence 46

Conclusion 47

Cases Cited

Adams v. Witmer, 271 F. 2d 29 34
Addison v. Holly Hill, 322 U. S. 607, 64 S. Ct. 1215 ... 23, 35
Application of Epstein, 267 A. D. 27, 44 N. Y. S. 2d 921 ..... 33, 39
Arizona Grocery Co. v. Atchison, etc., 284 U. S. 370, 52 S. Ct. 183 27
Baker v. Carr, — U. S. —, 82 S. Ct. 691 4
Barry v. O'Connell, 303 N. Y. 46 29
Barsky v. Board of Regents, 305 N. Y. 89, aff'd 347 U. S. 442, 74 S. Ct. 650 29
Barton Trucking Corp. v. O'Connell, 7 N. Y. 2d 299 .. 29, 30
Bender v. Board of Regents, 262 A. D. 627, 30 N. Y. S. 2d 779 ..... 33, 39
Bridges v. Wixon, 326 U. S. 135, 65 S. Ct. 1443 ..... 19, 39
Brown v. Board of Regents, etc., 273 N. Y. S. 809, aff'd without opinion, 266 N. Y. 598 ..... 22, 30
Brown Shoe Co. v. U. S., — U. S. —, 82 S. Ct. 1502 .. 4
Bryant v. Zimmerman, 278 U. S. 63 3
Burch v. Newberg, 10 N. Y. 391 ..... 27, 35
Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855 ..... 24, 31, 47
C. B. & Q. R. v. Drainage Comms., 200 U. S. 580 3
Charleston, etc., v. Alderson, 324 U. S. 182 3

PAGE

C. I. R. v. Acker, 361 U. S. 87, 80 S. Ct. 144 21
Cole v. Arkansas, 333 U. S. 196 38
Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126 23
Craig v. Harney, 331 U. S. 373 3
Cramp v. Board, etc., — U. S. —, 82 S. Ct. 275 4
Creswill v. Knights of Pythias, 225 U. S. 261 3
Cummings v. Missouri, 71 U. S. 277 .....19, 24, 27, 35

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 3
Darweger v. Staats, 267 N. Y. 290 .....24, 41, 44, 45, 46
De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255 38

Engel v. Vitale, — U. S. —, decided June 25, 1962... 47

Fink v. Cole, 302 N. Y. 216 .....24, 30, 31
Fletcher v. Peck, 6 Cranch. 138, 10 S. Ct. 87 27
Fluornoy v. Wiener, 321 U. S. 253 .....3, 6, 34

Garner v. Louisiana, — U. S. —, 82 S. Ct. 248 38
Genova v. Board of Regents, 272 A. D. 1085, 74 N. Y. S. 2d 729 41
Glasser v. U. S., 315 U. S. 60 35
Glidden Co. v. Zdanok, — U. S. —, 82 S. Ct. 1459 ... 4
Gulf, etc. v. Ellis, 165 U. S. 150 29

Hecht v. Monaghan, 307 N. Y. 461 ..... 32, 38
Heflin v. U. S., 358 U. S. 415, 79 S. Ct. 451 21
Hennessey v. Personal Finance Corp., 176 M. 201, 26 N. Y. S. 2d 1012 23
Hilfer v. Board of Regents, 283 N. Y. 304....8, 40, 41, 44, 45
Hopt v. Utah, 110 U. S. 574 27
Hurtado v. California, 110 U. S. 516 29

I. C. C. v. Louisville & Nashville R. Co., 227 U. S. 88, 33 S. Ct. 185 34
Inland Steel Co. v. NLRB, 109 F. 2d 9 32
In Re Donegan, 282 N. Y. 285 20

	PAGE
In Re Wacht's Estate, 32 N. Y. S. 2d 871	35
Irvin v. Dowd, 359 U. S. 394, 79 S. Ct. 825	40, 41
Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88, 33 S. Ct. 185	38
Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618	23
Largent v. Texas, 318 U. S. 418	3
Lawrence v. State Tax Com., 286 U. S. 276	3, 4
Lewis v. Johnson, 16 F. 2d 180	35
Lloyd, etc. v. Elting, 287 U. S. 329, 53 S. Ct. 167	35
Matter of Case, 214 N. Y. 199	39
Matter of City of Utica v. Water Control Board, 5 N. Y. 2d 164	29
Matter of Dey v. Howland Co., 224 N. Y. 30	45
Medley, Petitioner, 134 U. S. 171	27
Mooney v. Holahan, 294 U. S. 103	34
Moore v. Chesapeake & Ohio, 340 U. S. 573	39
Moore v. Dempsey, 261 U. S. 86	40
Morgan v. U. S., 304 U. S. 1, 58 S. Ct. 773	38
Morgan v. U. S., 298 U. S. 468, 56 S. Ct. 906	46
National Bank of Auburn v. Lewis, 75 N. Y. 516, Am. Rep. 484	20, 23
Neal v. Delaware, 103 U. S. 370	41, 42
Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186	20
N. Y. & Oswego Midland R. Co. v. Van Horn, 57 N. Y. 473	35
O'Dea's Bar, etc. v. N. Y. S. L. A., 201 N. Y. S. 2d 340	47
Packer Collegiate Institute v. University of the State of New York, 298 N. Y. 184	24
Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 837	24
People v. Benc, 288 N. Y. 318	21
People v. Budd, 143 U. S. 517	3
People v. C. Klinck Packing Co., 214 N. Y. 121	22, 29, 30

	PAGE
People v. Florentine, 276 A. D. 730, 97 N. Y. S. 2d 553	42
People v. Gillette, 126 A. D. 665, 111 N. Y. S. 133	42
People v. Jackson, 2 N. Y. 2d 259	43
People v. Laino, 10 N. Y. 2d 161	42
People v. McCall, 219 N. Y. 84, aff'd 245 U. S. 345, 38 S. Ct. 122	4, 29
People v. Roth, 11 N. Y. 2d 80	42
People v. Shapiro, 4 N. Y. 2d 597	21
People v. Steuding, 6 N. Y. 2d 214	42, 43
People v. Wallace & Co., 282 N. Y. 417	22
People v. Waterman, 9 N. Y. 2d 561, 216 N. Y. S. 2d 70	42
Phipps v. Bowers (2 Cir.), 49 F. 2d 996, cert. denied, 284 U. S. 641, 52 S. Ct. 22	35
Pierce v. U. S., 314 U. S. 306, 62 S. Ct. 237	23
Pierre v. Louisiana, 306 U. S. 354	4
Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 64	38
Protnicki v. N. Y. State Department of Civil Service, 220 N. Y. S. 2d 698	28, 35
Prudential Insurance Co. v. Cheek, 259 U. S. 530, 42 S. Ct. 516	6, 34
Pyle v. Kansas, 317 U. S. 213	34
Ray v. Board of Regents, 9 A. D. 2d 560, 189 N. Y. S. 2d 299	41
Re Evergreens, 47 N. Y. 220	27
Re Protnicki, 28 M. 2d 1022, 220 N. Y. S. 2d 698	28, 35
Re Wacht's Estate, 32 N. Y. S. 2d 871	28
Rogers v. Alabama, 192 U. S. 226	3
Roper v. U. S., — U. S. —, 82 S. Ct. 5	4
R. R. Co. Op., etc. v. Boston, etc., 149 M. 349, 267 N. Y. S. 204	35
Schechter Poultry Corp. v. U. S., 295 U. S. 495, 55 S. Ct. 837	24, 30
Schmidt v. District Attorney, 255 A. D. 353, 8 N. Y. S. 2d 787	42
Seattle Title & Trust v. Roberge, 278 U. S. 116	4
Shelly v. Kraemer, 334 U. S. 1	41

PAGE

Smigel v. Board of Regents, 15 A. D. 2d 623, 222 N. Y. S. 2d 457 41
Small v. Moss, 279 N. Y. 288 24
Snowden v. Hughes, 321 U. S. 1, 64 S. Ct. 397 40
Southwick v. Southwick, 49 N. Y. 520 27
Sterling v. Constantin, 287 U. S. 378 3
St. Louis & Iron Mountain R. v. Taylor, 210 U. S. 281 3
Stuart v. Palmer, 74 N. Y. 183 29
Sturgis v. Spofford, 45 N. Y. 466 21
Sugarman v. U. S., 249 U. S. 182 3
Sung v. McGrath, 339 U. S. 33, 70 S. Ct. 445 32
Swalbach v. State Liquor Authority, 7 N. Y. 2d 518 .. 29

Titus v. Wallick, 306 U. S. 282 4
Tompkins v. Board of Regents, 299 N. Y. 469 41
Tumey v. Ohio, 273 U. S. 510 39

U. S. v. Barner, 195 F. S. 103 21
U. S. v. Eaton, 144 U. S. 677, 27 S. Ct. 764 ..... 22, 23
U. S. v. Grimaud, 220 U. S. 506, 31 S. Ct. 480 30
U. S. v. Halseth, 342 U. S. 277, 72 S. Ct. 275 21
U. S. v. La Valee, 210 F. 2d 513, cert. denied, 80 S. Ct. 403 42
U. S. v. Universal C. I. T. Credit Corp., 344 U. S. 218, 73 S. Ct. 227 23
U. S. v. Zimmerman, 94 F. S. 22 ..... 35, 39

Vipreck v. U. S., 318 U. S. 236, 63 S. Ct. 561 23
Weinstein v. Board of Regents, 44 N. Y. S. 2d 917, 267 A. D. 4 20
Wichita R. R. v. Public Utility Com., 260 U. S. 48 ..... 41, 44, 45, 46
Wo v. Hopkins, 118 U. S. 356 ..... 4, 29, 41, 42

Yakus v. U. S., 321 U. S. 414 4
Yazoo, etc. v. Clarksdale, 257 U. S. 10 4
Yick Wo v. Hopkins, 118 U. S. 356 ..... 4, 29, 41, 42

Zucht v. King, 260 U. S. 174 3

Laws Cited

PAGE

Constitution of the United States:

Art. 1, Sec. 10 27

Fourteenth Amendment 4, 5, 6, 7, 18, 21, 23, 24

28 U. S. C. 1257(2) 3

New York State Laws:

Civil Practice Act, Art. 78 .....3, 14, 31

Education Law:

Sec. 211 4

Sec. 211, subd. 1 .....6, 11, 18, 28

Sec. 6501, subd. 4 ..... 4, 21

Sec. 6514, subd. 2 8

Sec. 6514, subd. 4 44

Sec. 6514(2a) 4, 5, 8, 12, 18, 20, 21, 22, 23, 43

Sec. 6514(2g) 4, 5, 7, 8, 9, 12, 13, 18, 20, 21, 22, 23, 24, 27, 35, 43

Sec. 6515: 3, 4, 5, 9, 13, 28, 30, 33

Subd. 1 .....9, 13, 30, 43

Subd. 2 ..... 10, 30

Subd. 4 .....11, 13, 28, 31, 39, 41, 45

Subd. 5 .....3, 10, 14, 30, 31

Subd. 9 ..... 13, 44

L. 1953, c. 682 24

Penal Law, Sections 270-d, 270-e, 270-d, 276 .. 8

Rules and Regulations of the State of New York, Title 8, Part 17 (and 17.4) 9, 32, 39, 45

IN THE

Supreme Court of the United States

October Term, 1962

No.

In the Matter of the Application of

DR. DAVID WASSERMANN,

Appellant,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

On Appeal from a Judgment of the New York State Court of Appeals

---

APPELLANT'S JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Court of Appeals of the State of New York, entered April 5th, 1962, which affirmed an order of the Appellate Division of the Supreme Court, confirming appellee's order revoking appellant's license to practice medicine. The Supreme Court has jurisdiction of this appeal. A substantial federal question is presented herein, in respect to deprivation of due process and denial of the equal protection of the laws,

resulting in the revocation of appellant's license to practice medicine.[1]

Opinions Below

The opinion of the Court of Appeals of the State of New York is unreported as yet. It is set forth herein in the appendix, at page 1a.

The opinion of the Appellate Division, Third Department, of the Supreme Court of the State of New York is reported at 13 App. Div. 2d 591, 212 N. Y. Supp. 2d 884, and is set forth in the appendix, at page 7a.

The report and findings of the Subcommittee on Grievances of the Department of Education of the State of New York is unreported officially and is set forth herein in the appendix at page 16a.

The report of the Committee on Grievances of the Department of Education of the State of New York is unreported officially and is set forth herein in the appendix at page 13a.

The report of the Regents' Committeee on Discipline of the Department of Education of the State of New York is unreported officially and is set forth in the appendix at page 10a.

The vote of the Regents is set forth in the appendix at page 9a.

---

[1] The appendix hereto is the separate appendix filed with appellant's separate petition for a writ of certiorari to review the judgment herein of the New York State Court of Appeals (No. 227, October Term, 1962). Page references followed by "a", such as "27a", are references to pages of the said appendix.

Grounds for Jurisdiction of Supreme Court

This matter originated in the Appellate Division, Third Department, of the Supreme Court of the State of New York (hereinafter referred to as the Appellate Division), as a judicial review (pursuant to Article 78 of the New York State Civil Practice Act and New York State Education Law section 6515, subd. 5) of appellee's administrative determination, revoking appellant's license to practice medicine in the State of New York.

The judgment sought to be reviewed herein is that of the Court of Appeals of the State of New York, dated and entered April 5, 1962. The Appellate Division entered its order on May 16, 1962, adopting, as its own, the judgment of the Court of Appeals.

The notice of appeal herein was first filed June 13, 1962, and an amended notice of appeal was filed June 19, 1962, in the said Appellate Division, the amended notice of appeal including the said Appellate Division order that was entered May 16, 1962.

This court has jurisdiction of this appeal under the provisions of 28 U. S. C. 1257 (2).

Jurisdiction of this [illegible] on this direct appeal is sustained by the following cases:

Bryant v. *Zimmerman*, 278 U. S. 63; *Rogers* v. *Alabama*, 192 U. S. 226, 230; *C. B. & Q. R.* v. *Drainage Comms.*, 200 U. S., 580, 581; *Lawrence* v. *State Tax Com.*, 286 U. S. 276, 282, 283; *St. Louis & Iron Mountain R.* v. *Taylor*, 210 U. S. 281; *People* v. *Budd*, 143 U. S. 517; *Largent* v. *Texas*, 318 U. S. 418; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Charleston etc.* v. *Alderson*, 324 U. S. 182, 185-186, 187; *Craig* v. *Harney*, 331 U. S. 373; *Sterling* v. *Constantin*, 287 U. S. 378; *Creswill* v. *Knights of Pythias*, 225 U. S. 261; *Flournoy* v. *Wiener*, 321 U. S. 253, 263; *Zucht* v. *King*, 260 U. S. 174, 177; *Sugarman* v. *U. S.*, 249 U. S. 182,

184; *Seattle Title & Trust* v. *Roberge*, 278 U. S. 116; *Yakus* v. *U. S.*, 321 U. S. 414; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Lawrence* v. *State Tax Com.*, 286 U. S. 276, 282-3; *Yazoo, etc.* v. *Clarksdale*, 257 U. S. 10, 15, 16; *Titus* v. *Wallick*, 306 U. S. 282, 291; *Pierre* v. *Louisiana*, 306 U. S. 354; *Cramp* v. *Board, etc.*, U. S. , 82 S. Ct. 275; *Baker* v. *Carr*, U. S. , 82 S. Ct. 691, 716; *Roper* v. *U. S.*, U. S. , 82 S. Ct. 5, 7.; *Brown Shoe Co.* v. *U. S.*, U. S. , 82 S. Ct. 1502, 1513; *Glidden Co.* v. *Zdanok*, U. S. , 82 S. Ct. 1459, 1465; *People* v. *McCall*, 245 U. S. 345, 348, 349.

Laws Involved

1. Section 1 of Amendment 14 to the United States Constitution (22a).

2. New York State Education Law, Section 211 (22a).

3. New York State Education Law, Section 6501, Subd. 4 (23a).

4. New York State Education Law, Section 6514, Subd. 2(a) (24a).

5. New York State Education Law, Section 6514, Subd. 2(g) (24a).

6. New York State Education Law, Section 6515 (24a).

QUESTIONS PRESENTED

(Appealable and Non-Appealable Questions)

A. Appealable Questions

Was appellant deprived of due process, in violation of the Fourteenth Amendment to the Constitution of the United States, in that:

Assignments of Error

I. Subdivisions 2(a) and 2(g) of New York State Education Law Section 6514 are invalid as being repugnant to the United States Constitution?

a. They do not set the standard of conduct to be prohibited;

b. They are vague and indefinite so that those whose conduct is to be controlled are not informed what specific conduct is prohibited;

c. Subdivision 2(g) is an *ex post facto* law and was enforced retroactively against appellant.

II. New York State Education Law Section 6515 is invalid as it is repugnant to the Constitution of the United States. It authorizes a procedure which denies appellant due process of law and a fair hearing, and delegates unfettered discretion to appellee.

a. The appellee is authorized to bottom its findings against the appellant on suspicion, conjecture, inference and hearsay, without any evidence of probative value to support such findings.

b. Appellee and its administrative body are authorized to hold the subject hearing and decide the charges against appellant without any standard to judge or control the admissibility of testimony.

c. The subject hearing is authorized to be held by an untrained tribunal, mentally incompetent insofar as it lacked legal training or experience.

d. The subject hearing is authorized to be held by an industry body of unpaid private citizens.

e. The administrators who made the final decision herein were authorized to do so without hearing the evidence or without studying the evidence.

f. The appellee was authorized to decide the matter, as it deemed fit, without any standard being set for the exercise of its discretion, and in disregard of the evidence.

g. Appellee and its administrative committees were authorized to find appellant guilty of acts not charged against him, in the exercise of their unfettered discretion.

h. The hearing was authorized to be held by the accusers.

B. Non-Appealable Questions

The following non-appealable questions are presented on this appeal (under the authority of *Flournoy* v. *Wiener*, 321 U. S. 253, 263, 64 S. Ct. 548, 553; *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 547, 42 S. Ct. 516, 523):

I. Was appellant deprived of due process in violation of the Fourteenth Amendment to the United States Constitution in that:

(1) the subject hearing was held in a prejudiced, unfriendly and hostile forum, and was not a fair hearing;

(2) section 211, subd. 1; of the New York State Education Law is repugnant to the United States Constitution because it delegates an unfettered discretion to appellee to act on charges regardless of the evidence?

II. Was appellant denied the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution in that:

(1) he was denied a remedy, that was available to him, by the courts of the State of New York;

(2) he was meted out an unusually severe penalty, as contrasted to more lenient penalties meted out by appellee to other licensees for more serious offenses?

III. Was appellant denied the equal protection of the laws and deprived of due process in violation of the Fourteenth Amendment to the United States Constitution when:

(1) he was compelled to testify against himself and was deprived of counsel at the Arkwright investigation;

(2) a false exhibit was used by appellee's committees and submitted to the Appellate Division and Court of Appeals, thereby deceiving the committees and the Courts and depriving the appellant of a fair hearing;

(3) the proceedings against the appellant were initiated and conducted in a "lynch" atmosphere, whipped into a frenzied state of public and professional hysteria by glaring newspaper headlines screaming the offenses of 500 doctors, resulting in a mass "witch hunt";

(4) Subdivision 2(g) was enforced against appellant retroactively;

(5) The New York State Court of Appeals denied appellant a remedy which was available to him and which the Court had previously

granted in *Hilfer* v. *Board of Regents*, 283 N. Y. 304, 307-309;

(6) There was no probative evidence to support appellee's findings?

Statement

Appellant's license to practice medicine was revoked by appellee in October, 1960, under the following circumstances.

In November, 1957, appellant, in violation of his constitutional protection against compulsory self-incrimination, was subpoenaed and compelled to testify as a witness in a criminal investigation[2] into "ambulance-chasing" in New York City (the so-called "Arkwright Investigation"), without being informed that he was one of the targets of the said investigation.

During his testimony, his counsel was excluded from the room, thereby depriving appellant of his constitutional right to the aid of counsel at every stage of the said criminal investigation.

Later, at the appellee's hearing of charges against appellant, appellee read into evidence appellant's testimony taken in the said Arkwright investigation, the admission of this testimony into evidence being a further violation of appellant's constitutional right not to be compelled to testify against himself (R. 109, ff. 327-380).

Subsequently, on March 1, 1960, appellant received a notice of hearing and charges (R. 39, ff. 115-151) against him from appellee, charging violations of subd. 2(a) and 2(g) of New York State Education Law Section 6514, said subd. 2 thereof authorizing revocation or suspension of appellant's license to practice medicine, if he was found guilty.

---

[2] Violation of Penal Law Sections 270-a, 270-c, 270-d, 276.

The charges accused appellant of:

1. Violation of 2(a) in that he:

a. submitted false bills and medical reports to an attorney, I. Frank Miller, in 1951 and 1952 (R. 44, ff. 131-139);

b. submitted false bills and medical reports to an attorney, I. Frank Miller, in 1956 (R. 47, ff. 139-142);

2. Violation of 2(g) in that, in 1951, he entered into an illicit and illegal conspiracy with an attorney, I. Frank Miller, for appellant to furnish the said attorney with false medical reports and bills, and that, pursuant to the said conspiracy, appellant did furnish the attorney with false bills and reports (R. 48, ff. 143-149).

Subd. 2(g) was not promulgated until 1953.

The appellee's hearing into the charges was held on March 23, 1960 (R. 37, f. 109).

The charges were made by appellee's investigator, under the provisions of Education Law Section 6515 (24a-29a).

Under Section 6515, a grievance committee is provided for, to consist of ten members (24a; subd. 1) to be appointed by appellee from specified medical societies (25a; subd. 2), such ten members to be duly licensed physicians.

The said grievance committee is given jurisdiction to hear all charges against physicians for violations of Section 6514 (25a; subd. 4).

Appellee's Rule 17.4[3] provides that if the grievance committee votes to prefer charges against the physician, the charges shall be submitted to the attorney general for

---

[3] Official Compilation of Codes, Rules and Regulations of the State of New York, Title 8, Part 17:

"17.4 Charges. It is the duty and responsibility of the board or grievance committee to decide whether the charges should

(Footnote continued on page 10)

his determination as to whether or not they shall be prosecuted.

Since it is the attorney general who prosecutes the charges against physicians before appellee, the required procedure insures that the matter is heard and judged by the accuser, and the required consultation between the grievance committee and the attorney general insures that the matter is prejudged by the ones who are to be the triers of the facts, in violation of the fundamental constitutional requirement that the hearing to be held in such matters as this be a "fair" hearing, before a fair and impartial forum.

The chairman of the committee may designate a subcommittee of three members to hear the charges (26a), as was done herein, apparently.

Such a hearing subcommittee is required to make a written report of its findings and recommendations (27a).

The committee is not bound by the laws of evidence in the conduct of its proceedings, but its determination is required to "be founded upon *sufficient* legal evidence to sustain the same" (emphasis supplied) (28a; subd. 5), but "sufficient legal evidence" is not defined for the benefit of the medically trained minds of the members of the medical grievance committee, who are all required to be licensed physicians (Sec. 6515, subd. 2; 25a).

The full ten member grievance committee is then authorized to act upon the subcommittee's recommendation *"as it shall deem fit"* (27a), a delegation of unfettered discretion.

A finding of guilty by the grievance committee is required to be by the *unanimous* vote of the *ten member* committee (27a).

---

be dismissed or heard, and, if the latter, to vote formal charges. If the formal charges are voted, the Specifications therefore shall be prepared and the matter submitted to the attorney general for his determination as to whether or not to proceed with the prosecution."

If the committee unanimously votes the physician guilty, the findings and records are required to be sent to appellee, the regents, who, after due hearing,[4] shall, *in their discretion,* execute an order accepting or modifying the committee's determination (27a-28a, subd. 4; 23a—Education Law, sec. 211, subd. 1).

This is a delegation of unfettered discretion.

Under these procedural provisions, appellee held its hearing into the charges against appellant.

Appellee's hearing sub-committee allowed its prosecutor, the Attorney General, to introduce hearsay without restraint or limitation.

The record is replete with hearsay, none of which appellant could cross-examine.

There is no probative or substantive evidence in the record to support the *charges.* The *findings* of the hearing subcommittee are inconsistent. They differ from the charges as well as from each other.

THE CHARGES	THE FINDINGS
R. 44, f. 131—First Specification:	R. 190, f. 570:
Appellant "submitted" false bills and reports to attorney Miller in 1951, 1952 and 1956, constituting fraud or deceit in the practice of medicine in violation of Education Law sec. 6514, subd. 2(a).	Appellant "*issued* (false medical bills and reports * * * (emphasis supplied).
	R. 193, f. 579:
	"* * * the medical bills and reports were prepared by the attorney (Miller) * * *".

[4] This "due hearing" was not a hearing *de novo* given appellant, but a hearing on the record adduced before the hearing subcommittee, and thus was more in the nature of an argument on an appeal than a "due hearing".

THE CHARGES	THE FINDINGS
R. 48, f. 143—Second Specification:	R. 193, f. 579; R. 194, f. 580-1:
In 1951, the appellant entered into an illicit and illegal conspiracy with attorney Miller for appellant to "furnish to the said I. Frank Miller false, fraudulent and exaggerated medical bills and medical reports" and that, "pursuant to said conspiracy", appellant did "furnish to the said I. Frank Miller such medical bills and reports * * *", in violation of 2(g).	Constituting "the fraudulent practice of medicine and unprofessional conduct", in violation of 2(a) and 2(g), appellant "had entered into a course of dealing with the attorney I. Frank Miller in 1951 * * *"; that appellant, during that time, had "issued medical bills and reports" that "were prepared by the attorney", and that "It is apparent that this course of doing business arose out of and was in furtherance of an agreement between respondent and the attorney" whereby the appellant "would issue false and fraudulent medical bills and reports".

Thus, under the first specification, appellant was charged with "submitting" and was found guilty of "issuing".

He was thus found guilty of an act not charged against him, in violation of his constitutional rights.

The finding that the attorney prepared the reports refutes the charge that appellant "submitted" the reports to the attorney.

Under the second specification, appellant was charged with conspiracy to "furnish" Miller with reports and was charged with "furnishing" Miller with reports. The finding was that appellant had an agreement with Miller for appellant to "issue false and fraudulent medical bills and reports," and that appellant had "issued medical bills and reports" that were "prepared by the attorney".

Since the finding was that the attorney prepared the reports, clearly the appellant did not "furnish" them to him.

The appellee therefore found appellant guilty of a conspiracy to "issue" and found him guilty of "issuing"; acts that were not charged against him.

Again, the finding that "the medical bills and reports were prepared by the attorney (Miller) • • • ". (R. 193, f. 579) is inconsistent with the finding that appellant "issued" them.

Subd. 2 (g) did not become effective until 1953. It is a constitutionally prohibited *ex post facto* application to apply it to acts alleged to have occurred in 1951 and 1952.

The same alleged acts are used to support the findings under both the first and second specifications, thus establishing merger and double punishment, in violation of law and in violation of appellant's right to the equal protection of the laws.

When the hearing sub-committee's findings and recommendations were sent to the grievance committee, the composition of the grievance committee was not in compliance with statutory requirement. It was not composed of *ten* members as required by Sec. 6515 (24a; sec. 6515, subd. 1), one member of the committee having died. The vote of guilty by *nine members* (R. 197, f. 589) did not meet the statutory requirement of a unanimous vote of the *ten member committee* (27a; sec. 6515, subd. 4).

There is no provision in sec. 6515 for a quorum of the grievance committee to *vote* on the hearing sub-committee's findings. Subd. 9, which sets forth a quorum provision, is clearly applicable only when the full grievance committee sits as the hearing committee to *hear* charges.

The appellee's committee on discipline then held its "hearing" (R. 201, f. 601) and reported to appellee (R.

201-203, F. 601-609) that it sustained the findings of the grievance committee and recommended revocation.

The appellee thereafter voted to accept and sustain the grievance committee's determination and ordered revocation of appellant's license (R. 204, f. 610).

The record does not show that appellee or its grievance committee studied or reviewed the record before reaching their determinations (R. 204, f. 610; R. 195-196, f. 583-588).

On October 31, 1960, an order was made revoking the appellant's license.

On November 15, 1960, by order to show cause, appellant petitioned the Appellate Division, Third Dept., of the Supreme Court of the State of New York for judicial review of appellee's determination, under the provisions of Article 78 of the Civil Practice Act and Education Law sec. 6515, subd. 5 (28a).

Exhibit D, the basic proof of appellee's claim of appellant's lack of credibility, was replaced by appellee with a false document, concededly considered to be of sufficient importance by appellee to be reasserted before the Court of Appeals, in spite of its retraction as a false document following hearing before the Appellate Division.

The finding of guilt was illegal.

In appellee's brief to the said Appellate Division, appellee made reference to appellant's Exhibit D[5], which was put in evidence before its hearing sub-committee (R. 154, f. 462), as a typewritten document, when, in fact, it was handwritten by appellant (R. 153, f. 458), and appellee emphasized to the Appellate Division that the typed Exhibit D showed that appellant's contention of not having

---

[5] Excerpt from appellee's Appellate Division brief, p. 8:

"Despite this inconsistency and discrepancy, nevertheless, on his own direct examination below, petitioner introduced a typewritten sheet of paper showing 18 entries * * *."

secretarial services as reason for the attorney preparing the reports was a contrived story, thus striving to destroy appellant's credibility.[6]

After the matter was argued before the Appellate Division, appellee's counsel forwarded to the Appellate Division an explanatory letter,[7] establishing that the original

---

[6] Excerpt from appellee's Appellate Division brief, p. 10:

"We point out, significantly, that while petitioner maintained he had no secretarial help and his reports had to be typewritten as a reason for his acquiescence in permitting Miller to type the reports which he signed, his Exhibit D, *supra*, nevertheless, is typewritten in its entirety."

[7] Appellee's letter to Appellate Division re use of false Exhibit D:

"February 10, 1961

Hon. Francis Bergen
Presiding Justice
Appellate Division, Third Department
Albany, New York

Re: Wassermann v. The Board of Regents
January Term, 1961. No. 2945

Dear Judge Bergen:

I have learned today that Exhibit D handed up at the time of oral argument in the above-entitled proceeding is not the exhibit introduced by petitioner at the original hearing of this matter but a typewritten copy as prepared by the hearing stenographer who lost the original exhibit after it had been read into the minutes (fols. 462-464). I am advised that the stenographer himself typed up the copy which he marked Exhibit D in evidence.

When the matter was assigned to me at this office, I found Exhibit D in the form as handed up to the Court. Part of my advocacy on behalf of the respondent in our brief was based upon the fact that Exhibit D was typed rather than handwritten. In all fairness to petitioner and to the Court, I respectfully request that references on page 8 and 10 of our brief to Exhibit D as a typewritten document be disregarded. I wish to urge

(Footnote continued on page 16)

Exhibit D was, in fact, handwritten by appellant, but had been lost by the hearing stenographer, who had typed a copy in its place, and appellee's counsel requested that references in its brief to Exhibit D being a typed document be disregarded.

This letter is, of course, dehors the record and there is no indication that the Appellate Division considered it in its disposition of the matter or that it disregarded the false Exhibit D submitted to it by appellee. It appears probable, too, that the false exhibit was the one considered by appellee and its committees in reaching its determination, and that appellant's credibility was destroyed by such use of a false exhibit which unfairly and improperly tended to controvert appellant's testimony.

Despite appellee's letter of explanation to the Appellate Division, however, appellee again made reference to Exhibit D as a typed document in its later brief to the Court of Appeals [8], thus again tending to adversely and improperly affect appellant's credibility before a tribunal considering the matter.

---

here that Exhibit D at the time of the original hearing was, in fact, handwritten by petitioner.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By ROBERT W. BUSH
Assistant Attorney General

cc Hon. William H. Coon
Hon. James Gibson
Hon. J. Clarence Herlihy
Hon. Walter B. Reynolds
Angelo A. Tumminelli, Esq.
Bush:jml"

[8] Excerpt from appellee's Court of Appeals brief, p. 11:

"* * * on his own direct examination below, petitioner introduced a typewritten sheet of paper showing 18 entries * * *."

The Appellate Division confirmed appellee's determination (R. 214-216, Order of Affirmance; R. 217-219, 7a, Opinion).

The Court of Appeals affirmed the Appellate Division (1a, Opinion; 48a, Remittitur). Appellant's motion to amend the Remittitur to incorporate therein the statement that constitutional questions were raised and necessarily passed on (50a) was denied (57a).

The Appellate Division made an order adopting the Remittitur of the Court of Appeals (58a).

On July 5, 1962, appellant filed his petition to this court for a writ of certiorari to review the judgment of the Court of Appeals (October Term, 1962, No. 227). The notice of appeal herein was duly filed in the said Appellate Division on June 13, 1962, the said Appellate Division being the court having possession of the record. An amended notice of appeal was filed on June 18, 1962, to include therein the Appellate Division order adopting the Court of Appeals judgment.

The federal question as to denial of appellant's constitutional rights was first raised in appellant's petition to the Appellate Division (R. 15, fol. 44, et seq.). The Court failed to pass upon the constitutional questions raised, except indirectly by confirming appellee's order of revocation (see opinion, R. 217-219, 7a).

The federal question of unconstitutionality was thereafter again raised by appellant in his motion to the Court of Appeals for leave to appeal thereto (see motion for leave to appeal to the Court of Appeals) p. 8 subpars. (a) and (d) (35a-36a); p. 9, subpar. III, subpar. 6 (36a-37a); p. 10, subpar. 7 (37a); p. 19, paragraph in midpage (41a); p. 20, last paragraph thereof (41a); p. 22, headnote thereon (42a); p. 23, first paragraph thereof (42a); p. 24, Point I, Headnote (43a); p. 27, Point II, Headnote (43a); p. 28, next to last paragraph (43a); p. 29, last paragraph (43a); p. 30, last paragraph (43a); p. 34, bottom of paragraph

(44a); p. 35, bottom of page (44a); p. 39, paragraph preceding Point V (44a).

The Court of Appeals granted the said motion for leave to appeal to it on the aforesaid questions raised (R. 220).

The federal questions were then presented in the Court of Appeals as follows: Appellant's brief, Points II, III and IV, pp. 26-28 (45a-47a).

The Court of Appeals, in its opinion (1a), failed to comment on the constitutional questions raised by appellant and apparently disposed of the federal questions with the following statement:

> "We have considered carefully the other issues raised by appellant and find them to be without merit." (6a)

Substantial Federal Questions Are Raised Herein

It is respectfully submitted that the federal questions raised herein are substantial.

A. APPEALABLE QUESTIONS

POINT I

Education Law Sections 211 (subd. 1), 6514 (subd. 2(a) and 2(g)) and 6515 are repugnant to the 14th Amendment to the Constitution of the United States, and the decision of the Court below, sustaining their validity, deprives appellant of due process, denies him the equal protection of the laws and raises a substantial federal question for this Court to review.

A. Subd. 2(a) and 2(g) of Education Law Section 6514 are disciplinary statutes imposing penalties and punishment, and must be strictly construed as penal statutes.

Subd. 2 (24a) provides that the subject license may be revoked, suspended or annulled in the following cases:

> "(a) That a physician * * * is guilty of fraud or deceit in the practice of medicine * * *
>
> * * *

(g) That a physician is or has been guilty of unprofessional conduct. The regents shall have power to promulgate rules to give effect to this section.

* * *"

Subd. 2a and 2(g) are, therefore, not only akin to penal statutes, they are, in fact, penal statutes, as they inflict a penalty or punishment—a disqualification to pursue an avocation or profession, a deprivation of a civil right.

It was so held, and clearly, by this court in *Cummings* v. *Missouri*, 71 U. S. 277, 320 [10], 321-322 [11], 327 [12], 328-329 [13]. and in *Bridges* v. *Wixon*, 326 U. S. 135, 147, 65 S. Ct. 1443,

---

[10] "The disabilities created * * * must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.' * * * The deprivation of any rights, civil or political, previously enjoyed, may be punishment. * * * Disqualification from the pursuits of a lawful avocation * * * may also, and often has been, imposed as punishment."

[11] "The feeling upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone; and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty, or property, but also embracing deprivation or suspension of political or civil rights * * *."

[12] "* * * such denial (of the right to pursue an avocation) enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else.

Now, some of the acts to which the expurgatory oath is directed were not offences at the time they were committed. * * * Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an ex post facto law—'they impose a punishment for an act not punishable at the time it was committed.'"

[13] "Thus, had it provided as follows: Be it enacted, that all persons who had heretofore, at any time, entered or left the State

(Footnote continued on page 20)

1449, this court approximated the deprivation of the right to pursue a vocation or calling to a criminal punishment.

In *Weinstein* v. *Board of Regents*, 44 N. Y. S. 2d 917, 267 A. D. 4 [14], New York's Appellate Division, Third Dept., held (at p. 920 of 44 N. Y. S. 2d) that appellee's hearing in a disciplinary proceeding against a doctor "is not criminal but the punishment which may be administered is highly penal."

In *In re Donegan*, 282 N. Y. 285, 292, the New York State Court of Appeals held that revocation of a professional license is in the nature of punishment [15].

See also: *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110, 31 S. Ct. 186.

In *National Bank of Auburn* v. *Lewis*, 75 N. Y. 516, 521, it was held that a statute providing for a forfeiture is penal in character, should be strictly construed and should not be enlarged by implication.

It follows, therefore, that the subject statutes herein involved, 2(a) and 2(g), must be strictly construed, as is the rule with penal statutes (*In re Donegan*, *supra*, p. 20,

---

of Missouri, with intent to avoid enrollment or draft in the military service of the United States, shall, upon conviction thereof, be forever rendered incapable of * * * exercising any of the professions or pursuits mentioned * * * there would be no question of the character of the enactment. It would be an ex post facto law, because it would impose a punishment for an act not punishable at the time it was committed."

[14] Reversed on other grounds, 292 N. Y. 682.

[15] "Although disbarment is not strictly a punishment for crime, but only the withdrawal of a privilege * * * it cannot be denied that the requirement of automatic and irrevocable disbarment for life * * *, is in effect a consequence most severe, and partakes of the nature of punishment. Hence the statute must be interpreted in the light of the fundamental canon that penal statutes must be strictly construed."

282 N. Y. 285, 292, *People* v. *Benc*, 288 N. Y. 318, 323 [16]; *Sturgis* v. *Spofford*, 45 N. Y. 466, 453; *U. S.* v. *Halseth*, 342 U. S. 277, 72 S. Ct. 275, 277), against the party seeking their enforcement and in favor of the person being proceeded against (*People* v. *Shapiro*, 4 N. Y. 2d 597, 601; *Heflin* v. *U. S.*, 358 U. S. 415, 419, 79 S. Ct. 451, 453; *U. S.* v. *Barner*, 195 F. S. 103, 105).

In like vein, this court has said "the law is settled that 'penal statutes are to be construed strictly,'" (*C. I. R.* v. *Acker*, 361 U. S. 87, 91, 80 S. Ct. 144, 147).

B. Subd. 2(a) and 2(g) are vague, indefinite, undefined, lack intelligible or ascertainable standards and are repugnant to the 14th Amendment.

The subject statutes, 2(a) and 2(g) (24a; *supra*, p. 18), are vague, undefined, lack intelligible or ascertainable standards, and are repugnant to the 14th Amendment.

The only term that is defined in the two statutes is the term "practice of medicine", which is defined in sec. 6501, subd. 4, of the Education Law [17] (23a).

The said section defining the term "practice of medicine" clearly contains no reference to "submitting" false reports to an attorney (for the physician's patient) for the purpose of benefiting the patient financially; or to "issuing" such reports to such attorney for such purpose; or

---

[16] "Statutes which are penal in character must be narrowly and strictly construed and in manner not to embrace cases which do not clearly fall within their terms."

[17] "Section 6501. DEFINITIONS.

* * *

4. The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

to "furnishing" such reports to such attorney for such purpose; nor does the section refer to a "conspiracy" to "furnish" such reports to such attorney for such purpose.

Obviously, the term "practice of medicine", as defined in the said section 6501, relates *solely* to the health, safety and welfare of the patient, as the context so clearly shows, and the context of the definition shows no intent to protect insurance carriers from alleged fraudulent practices in negligence cases, in the sense that appellee seeks to attribute to the term "in the practice of medicine". Undoubtedly, the protection of insurance carriers from fraud, by prohibitory statutory provisions, has adequately been provided for by specific proper New York statutes, eliminating the need for forcing an unconstitutional implication into the subject statutes herein.

There is, therefore, no standard or statutory authority to charge the acts allegedly committed by appellant as having been committed "in the practice of medicine".

The terms "fraud or deceit", in 2(a), and "unprofessional conduct", in 2(g), are undefined, thus leaving the definition thereof to the unfettered discretion of the appellee, and thus constituting a constitutionally prohibited delegation of legislative function to appellee, the definition of offenses.[18]

The law requires the clear and exact definition of an offense (*People* v. *Wallace & Co.*, 282 N. Y. 417, 419-420); the statute must inform what the State commands or forbids

---

[18] The definition of offenses is the exercise of legislative function. *U. S.* v. *Eaton*, 144 U. S. 677, 27 S. Ct. 764.

> "The Board of Regents may not make laws; the power rests with the Legislature, and is non-delegable; * * *. The statute must prescribe a standard by which the action of the regents is governed. People v. C. Klinck Packing Co., 214 N. Y. 121, 139, * * *."
>
> *Brown* v. *Board of Regents, etc.*, 273 N. Y. S. 809, 811, aff'd without opinion 266 N. Y. 598.

(*Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619) and must not be ambiguous (*U. S.* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 222, 73 S. Ct. 227, 229) so that those who are subject to its provisions will not be required to speculate as to its meaning and differ as to its application (*Connally* v. *General Construction Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 127), and a vague statute may not be enlarged by implication, as words were available to make it clear (*Addison* v. *Holly Hill*, 322 U. S. 607, 617, 64 S. Ct. 1215, 1221), nor may judicial construction enlarge a vague statute, as was done by the court below, as "construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.'" (*Addison* v. *Holly Hill*, *supra*, p. 618 of 322 U. S., p. 1221 of 64 S. Ct.; *Pierce* v. *U. S.*, 314 U. S. 306, 311, 62 S. Ct. 237, 240; *Viereck* v. *U. S.*, 318 U. S. 236, 243, 63 S. Ct. 561, 564; *National Bank of Auburn* v. *Lewis*, 75 N. Y. 516, 521;[18a] *Hennessey* v. *Personal Finance Corp.*, 176 M. 201, 26 N. Y. S. 2d 1012, 1017[18b].)

C. Subd. 2(a) and 2(g) unconstitutionally delegate the power to set standards and define offenses and are repugnant to the constitution by reason of such delegation.

The subject statutes, 2(a) and 2(g) (24a; *supra*, p. 18), are repugnant to the 14th Amendment of the Constitution as they unconstitutionally delegate the legislative function of setting the standards and defining the offenses[19]

[18a] "The provision, Section 5198, which declares a forfeiture is penal in its character, and we concede, should be strictly construed, and not held to include any alleged violation that is not clearly within the plain intention of the act. Nor should it be enlarged by implication, but confined within its legitimate scope and object."

[18b] "Statutes imposing forfeitures should not be enlarged by implication, but should be confined within their legitimate scope and object. National Bank of Auburn v. Lewis, 75 N. Y. 516, 521, 31 Am. Rep. 484."

[19] *U. S.* v. *Eaton*, *supra*, fn. 18, 144 U. S. 677, 27 S. Ct. 764.

to appellee and its private industry committee[20] consisting only of licensed doctors from specified medical societies (*Small* v. *Moss*, 279 N. Y. 288, 299; *Packer Collegiate Institute* v. *University of the State of New York*, 298 N. Y. 184, 189, 191-2; *Darweger* v. *Staats*, 267 N. Y. 290, 304; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 55 S. Ct. 837; *Schechter* v. *U. S.*, 295 U. S. 495, 55 S. Ct. 837).

D. Subdivision 2(g) is a constitutionally prohibited *ex post facto* law and was applied retroactively against appellant.

Subdivision 2(g) (24a; *supra*, p. 18) was promulgated in 1953 (L. 1953, c. 682) and became effective in April, 1953. It is, therefore, a constitutionally prohibited *ex post facto* law to the extent that it relates to acts allegedly committed by appellant in 1951 and 1952. *Cummings* v. *Missouri*, 71 U. S. 277.

In *Cummings*, this Court held that a state may not deprive one of the right to pursue a vocation as a penalty for past acts committed, on the ground that it would be an *ex post facto law* prohibited by the Fourteenth Amendment.[21]

---

[20] *Fink* v. *Cole*, 302 N. Y. 216, 225; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 56 S. Ct. 855, 873; *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 529, 537, 55 S. Ct. 837, 843, 846.

[21] *Cummings* v. *Missouri*, 71 U. S. 277:

p. 319:

"But it by no means follows that, under the form of creating a qualification or attaching a condition, the States can in effect inflict a punishment for a past act which was not punishable at the time it was committed. The question is not as to the existence of the power of the State over matters of internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the Constitution."

(Footnote 21 continued)

p. 320:

"The disabilities [i.e. disqualification to pursue a vocation] created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.' * * * The deprivation of any rights, civil or political, previously enjoyed, may be punishment. * * *. Disqualification from the pursuits of a lawful avocation, * * * may also, and often has been, imposed as punishment."

pp. 321-322:

"The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike, open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty, or property, but also embracing deprivation or suspension of political or civil rights, * * *."

pp. 325-326:

"The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secured against deprivation for past conduct by legislative enactment, under any form, however disguised * * *.

By an ex post facto law is meant one which imposes a punishment for an act which was not punishable at the time it was committed * * *.

In Fletcher v. Peck, Mr. Chief Justice Marshall defined an ex post facto law to be one 'which renders an act punishable in a manner in which it was not punishable when it was not committed.' 'Such a law,' said that eminent judge, 'may inflict penalties on the person * * *.'"

(Footnote 21 continued)

p. 327:

"The clauses in the Missouri constitution, which are the subject of consideration, did not, in terms, defined in crimes, or declared that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared * * *. They are aimed at past acts * * * they were intended to operate by depriving such persons of the right * * * to pursue their ordinary and regular avocations. This deprivation is punishment * * *. * * * such denial (i.e. of the right to pursue a vocation) enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything less.

Now, some of the acts to which the expurgatory acts is directed, were not offences at the time they were committed. * * * Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an ex post facto law—'they impose a punishment for an act not punishable at the time it was committed.'"

p. 328:

"Thus, had it provided as follows: Be it enacted, that all persons who have heretofore, at any time, entered or left the state of Missouri, with intent to avoid enrollment or draft in the military service of the United States, shall, upon conviction thereof, be forever rendered incapable of * * * exercising any of the professions or pursuits mentioned * * * there would be no question of the character of the enactment. It would be an ex post facto law because it would impose a punishment for an act not punishable at the time it was committed."

p. 329:

"The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted."

Subdivision 2(g) was retroactively enforced against appellant for acts allegedly committed in 1951 and 1952.

Appellee found appellant, "on the entire record" (R. 194, f. 581), "is guilty of unprofessional conduct in the practice of medicine within the purview and meaning of Section 6514, subdivision 2(g) of the Educational Law of the State of New York" (R. 194, f. 581).

The "entire record" includes the acts allegedly committed by appellant in 1951 and 1952 (R. 193, f. 579),[22] and the charges, allegedly substantiated by the record, specifically charge acts in 1951 and 1952 (R. 44, f. 131; R. 45, f. 135; R. 48, f. 143). Appellee made no separation of acts prior and subsequent to enactment of 2(g).

Subdivision 2(g) is, therefore, repugnant to the Fourteenth Amendment as an *ex post facto* law and was retroactively enforced against appellant in violation of his constitutional rights to due process and the equal protection of the laws.[23] *Cummings v. Missouri, supra*, 71 U. S. 277; *Arizona Grocery Co. v. Atchison, etc.*, 284 U. S. 370, 389, 52 S. Ct. 183, 186; *Hopt v. Utah*, 110 U. S. 574; *Medley, Petitioner*, 134 U. S. 171; *Fletcher v. Peck*, 6 Cranch. 138, 10 S. Ct. 87, 137; *Burch v. Newbury*, 10 N. Y. 391, 392; *Re Evergreens*, 47 N. Y. 220; *Southwick v. Southwick*, 49 N. Y.

---

[22] R. 193, f. 579:

"The record before us further indicates that the respondent had entered into a course of dealing with the attorney I. Frank Miller in 1951 • • •."

[23] U. S. Constitution, Article 1, Section 10 (U. S. C. A. Const. Art. 1, sec. 10, p. 3).

"No State shall • • • pass any • • • ex post facto Law • • •."

520; *Re Wacht's Estate*, 32 N. Y. S. 2d 871, 878;[24] *Re Protnicki*, 28 M. 2d 1022, 220 N. Y. S. 2d 698, 700).[25]

POINT II

Section 6515 of the New York State Education Law is invalid as it is repugnant to the Constitution of the United States.

A. Section 6515 unconstitutionally delegates an unfettered discretion to appellee.

Subdivision 4 of Section 6515 (27a) provided that appellee's grievance committee could act upon the hearing subcommittee's recommendations "as it shall deem fit".

Said subdivision 4 further provided that "the regents after due hearing shall *in their discretion* execute an order accepting or modifying such determination" of the grievance committee (28a). (Emphasis supplied.)

This delegation of unfettered discretion to appellee is also confirmed, and is repeated, in Education Law, § 211, subd. 1 (23a), which authorizes the Regents (the appellee herein) to execute an order accepting or changing their Grievance Committee's determination "in their discretion".[26]

---

[24] "* * * a retrospective law may not validly impair vested rights."

[25] "A statute will not be applied retrospectively where it would, in effect, deprive one of a substantive right."

[26] "Hearings shall be upon the record before the grievance committee, * * *. The regents' committees conducting such hearings shall render a written report to the regents, * * * and the regents, without further hearing, shall in their discretion execute an order accepting or changing the determination of the grievance committee * * *."

Such delegation of unfettered discretion to appellee permits the appellee to make its determination and order without regard for the evidence adduced at its hearing.

Appellee, therefore, is unconstitutionally permitted the arbitrary exercise of power.

"The constitutional validity of law is to be tested, not by what *has* been done under it, but by what *may*, by its authority, be done." (Emphasis supplied)

Stuart v. *Palmer*, 74 N. Y. 183, 188.

There is no room in our constitutional form of government for the arbitrary exercise of power. This has been a frequent holding of this Court (*Gulf, etc.* v. *Ellis*, 165 U. S. 150, 159; *Wo* v. *Hopkins*, 118 U. S. 356, 366-7, 373; *Hurtado* v. *California*, 110 U. S. 516), and other Courts (*Barry* v. *O'Connell*, 303 N. Y. 46, 52; *Swalbach* v. *State Liquor Authority*, 7 N. Y. 2d 518, 522; *People* v. *McCall*, 219 N. Y. 84, affirmed 245 U. S. 345, 38 S. Ct. 122; *People* v. *C. Klinck Packing Co.*, 214 N. Y. 121, 138; *Matter of City of Utica* v. *Water Control Board*, 5 N. Y. 2d 164, 168).

Limits must be set for the exercise of discretion and the standards therefor must be set by the Legislature. *Matter of City of Utica* v. *Water Control Board*, 5 N. Y. 2d 164, 168.

The delegation of unrestrained discretion to appellee is unconstitutional, per Fuld, J., dissenting in *Barsky* v. *Board of Regents*, 305 N. Y. 89, 107-8, aff'd 347 U. S. 442, 74 S. Ct. 650.[27] (See also *Barton Trucking Corp.* v. *O'Connell*, 7 N. Y. 2d 299, 307 *infra*, fn. 29, p. 32.)

---

[27] "That is a subject, we have concluded, that rests in the discretion of the agency. However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory authority of the Regents is, in truth, as the court here holds, so broad, so unrestrained, then, I venture, the statute exceeds constitutional limits."

B. Section 6515 unconstitutionally fails to set a recognizable or intelligible standard for the quantum of evidence to guide appellee's hearing committee.

Section 6515, subd. 5 (28a), provides that appellee's grievance committee's determination "shall be founded upon *sufficient legal evidence* to sustain the same" (emphasis supplied), but does not define the term "sufficient" nor set up a standard to guide the grievance committee and to enable it to determine what is "sufficient" legal evidence, thereby delegating to the legally untrained minds of the grievance committee the discretion to set their own standards of what shall constitute "sufficient legal evidence".

This violates the constitutional precept that the legislature shall set the standard and guide the exercise of discretion. *Brown* v. *(Board of Regents) University of the State of New York*, 273 N. Y. S. 809, 811, affirmed without opinion, 266 N. Y. 598; *People* v. *C. Klinck Packing Co.*, 214 N. Y. 121, 139; *Fink* v. *Cole*, 302 N. Y. 216, 225; *U. S.* v. *Grimaud*, 220 U. S. 506, 517, 31 S. Ct. 480; *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 55 S. Ct. 837, 842, 843, 846, 848; *Barton Trucking Corp.* v. *O'Connell*, 7 N. Y. 2d 299, 307).[28]

C. Section 6515 unconstitutionally authorized a hearing tribunal lacking essential requirements of constitutionality.

Section 6515, subds. 1 and 2 (24a-25a), unconstitutionally required appellee's grievance committee to be composed of ten duly licensed physicians nominated from specified medical societies.

They served without salary, and presumably continued their private medical practices while so serving.

---

[28] "There can be no disputing the general rule that any discretionary powers exercised by an administrative officer must be delegated to him by statute, and that such delegation must be accompanied by standards to guide the exercise of administrative discretion."

Subdivision 4 (25a) gives this committee of doctors, selected from the specified medical societies, sole jurisdiction to hear all charges against physicians and, thus, to decide constitutional and statutory questions, as herein.

They thus constitute an industry body of unpaid private citizens to whom a public and judicial function has been delegated. This has been disapproved by the courts of New York and by this court. *Fink* v. *Cole*, 302 N. Y. 216; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855.

The findings and recommendations of this committee of licensed physicians become the basis for all subsequent action against the accused physician, including judicial review before the Appellate Division, Third Department, of the Supreme Court of the State of New York under Article 78 of the Civil Practice Act and Education Law, § 6515, subd. 5 (28a).

These duly licensed *physicians* are required: to evaluate testimony and evidence offered to determine relevancy and admissibility; to weigh the evidence; to separate hearsay from probative or substantive evidence; to determine if there is "sufficient legal evidence" (without being given a standard to determine what that means) to support a finding of guilt.

These medically trained minds are thus required to perform an undeniably judicial (or at least quasi-judicial) function for which they are not required to have any legal training or experience.

To delegate a legal and judicial function of such importance (the revocation of a license to practice a profession) to the mentally incompetent committee (i. e. mentally incompetent in that it lacks even fundamental legal training) shocks the conscience and offends our traditional requirements of fairness as strongly and deeply as it would were a statute to authorize a lawyer to perform a surgical operation.

Constitutional due process requires a fair hearing (*Sung* v. *McGrath*, 339 U. S. 33, 50, 70 S. Ct. 445, 454; *Hecht* v. *Monaghan*, 307 N. Y. 461), and a mentally competent tribunal is an essential part of a fair hearing. *Inland Steel Co.* v. *NLRB*, 109 F. 2d 9, 20.[29]

The questions before this subject hearing tribunal did not involve medical questions, medical matters or treatment of patients. This hearing committee was required to resolve purely legal questions of constitutional and statutory construction, problems the said committee was not trained or competent to cope with.

Appellee's Rule 17.4[30] requires all charges to be considered by the grievance committee, which then votes whether to prosecute formal charges against the accused.

The formal charges are then required to be sent to the Attorney General for his determination whether to prosecute them before the grievance committee. This violates the statutory requirement of Section 6515, subd. 4 (26a), that the grievance committee shall determine if a trial is necessary. Rule 17.4 makes the Attorney General the one to decide this question. (*Infra*, p. 45, Point III, c..)

The members of the grievance committee (and appellee's employees, such as its investigators) are therefore the accusers, as well as the triers of the facts. This dual role of accuser and judge has consistently been condemned as a vice, and violates the essential requirements of fair play. *Sung* v. *McGrath*, 339 U. S. 33, 43-45, 70 S. Ct. 445, 451-452.

The requirement of consultation between the grievance committee and the Attorney General ensures that the judge

---

[29] "Due process implies a tribunal both impartial and mentally competent to afford a hearing. * * *"

[30] See fn. 3, *supra*, p. 9.

and prosecutor have prejudged and predetermined the results of the hearing to be (*Application of Epstein*, 267 A. D. 27, 44 N. Y. S. 2d 921, 922), in violation of the constitutional requirement that the administrative hearing be a fair hearing before an impartial and unprejudiced forum.

By statute (§ 6515, subd. 5 (28a)), all judicial reviews of appellee's determinations are brought before the Appellate Division, Third Department, of the Supreme Court of the State of New York. This said Appellate Division, therefore, may well be considered expert in analyzing appellee's procedures. It has said of appellee and its tribunal that it is "a tribunal predisposed to conviction." (*Application of Epstein*, 267 A. D. 27, 44 N. Y. S. 2d 921, 922.), and "a friendly forum of its [appellee's] own selection." (*Bender* v. *Board of Regents*, 262 A. D. 627, 30 N. Y. S. 2d 779, 784.)

NON-APPEALABLE QUESTIONS

POINT III

Non-appealable questions are presented on this appeal under the authority of this Court's prior decisions.

Under the authority of *Flournoy* v. *Wiener*, 321 U. S. 253, 263, 64 S. Ct. 548, 553, and *Prudential Insurance Company* v. *Cheek*, 259 U. S. 530, 547, 42 S. Ct. 516, 523, non-appealable questions are presented on this appeal.

A. Appellant was deprived of due process and denied the equal protection of the law in violation of the Fourteenth Amendment.

(1). *The courts below and appellee's committees were deceived by false evidence.*

Appellee's use of a false Exhibit "D" (*supra*, pp. 14-16) deceived the courts below [31], impaired appellant's credibility [32] and violated his constitutional rights (*Mooney* v. *Holahan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213), as a decision on false evidence is, in actuality, a decision without evidence to support it. *I. C. C.* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91, 33 S. Ct. 185, 186.

False evidence can hardly be considered probative evidence, and a finding based even in part on such evidence

---

[31] Presumably, the appellee's committees considered the *false* exhibit during their consideration of the matter. This inference is a fair one since appellee has not denied it, although the same inference was made in appellant's petition for a writ of certiorari (October Term, 1962, No. 227) to which appellee has already filed its opposing brief, of which papers this Court may take judicial notice.

[32] "As a result there was no chance for appellant to have a decision based on the possibly *greater credibility of its witness* as against those for the Government. The opportunity to have that kind of hearing is a valuable right". (Emphasis supplied.)

Adams v. *Wilmer*, 271 F. 2d 29, 36.

must be set aside. *Lloyd, etc.* v. *Elting*, 287 U. S. 329, 339-340, 53 S. Ct. 167, 172; *Glasser* v. *U. S.*, 315 U. S. 60, 67; *U. S.* v. *Zimmerman*, 94 F. S. 22, 25; *Lewis* v. *Johnson*, 16 F. 2d 180, 182.

It is respectfully submitted that this violation of appellant's constitutional rights requires reversal of the court below and a new hearing for appellant in the interest of justice, as a finding of guilt predicated on false evidence violates constitutional rules and fundamental concepts of justice.

(2). *Retrospective application of subd. 2 (g) violated appellant's constitutional rights.*

The retrospective application of subd. 2 (g) (*supra*, p. 13; p. 24, Pt. I, D) violated appellant's constitutional rights.

The subdivision was enforced against appellant in respect to acts allegedly committed in 1951 and 1952, although Subd. 2 (g) did not become effective until 1953 (*supra*, pp. 11-12).

The hearing sub-committee's finding of guilt did not distinguish between the alleged acts prior to 1953 and those subsequent to 1953. The finding of guilt was predicated "on the entire record" (R. 194, f. 581).

Substantive rights may not constitutionally be divested by a retrospective application of a statute prescribing a penalty or a forfeiture. *Cummings* v. *Missouri*, 71 U. S. 277; *Addison* v. *Holly Hill*, 322 U. S. 607, 620, 64 S. Ct. 1215, 1222; *Phipps* v. *Bowers* (2 Cir.), 49 F. 2d 996, cert. denied 284 U. S. 641, 52 S. Ct. 22; *In re Wacht's Estate*, 32 N. Y. S. 2d 871, 878; *Protnicki* v. *N. Y. State Department of Civil Service*, 220 N. Y. S. 2d 698, 700; *N. Y. & Oswego Midland R. Co.* v. *Van Horn*, 57 N. Y. 473, 477; *R. R. Co-Op., etc.* v. *Boston, etc.*, 149 M. 349, 267 N. Y. S. 204, 206; *Burch* v. *Newbury*, 10 N. Y. 391, 392; U. S. Constitution, Article 1, Sec. 10, cl. 1.[33]

---

[33] "No State shall • • •; • • • pass any • • • ex post facto Law • • •."

(3) *The finding of guilt without probative or substantive evidence to support it violates appellant's constitutional rights.*

The record is replete with hearsay evidence to establish that a fraud was attempted, but hearsay cannot be used to support the finding of guilt.[33a]

There is no evidence in the record that the insurance carriers were, in fact, defrauded, or that they paid more money to the patients in settlement than the claims merited.[34]

[33a] *Consolidated Edison* v. *NLRB*, 305 U. S. 197, 59 S. Ct. 206:

> "The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling'. The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. * * * But the assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational *probative* force. *Mere uncorroborated hearsay or rumor does not constitute substantial evidence.*" (Italics supplied) (pp. 229-230 of 305 U. S.; p. 217 of 59 S. Ct.)

Clearly, therefore, although hearsay evidence is unquestionably admissible in an administrative hearing, it cannot be used as the basis for the finding of guilt, but the finding of guilt must be based on probative evidence.

[34] Patient Cohen received approximately $200 (R. 97, f. 289) for being shaken up (R. 91, f. 272).

Patient Turner (husband and wife) received $150 each (R. 97, f. 289) for being shaken up (R. 88, f. 262) and having funny feeling (R. 89, f. 289).

Patient Kaminsky received $1,000 (R. 62-63, ff. 186-187) for having his truck hit by street car. (Record does not establish if property damage included in settlement figure.)

Patients Gonzales and Morales (R. 75-81, ff. 224-243); no evidence of payment in the record; their car turned over a couple of times (R. 108, f. 322).

They did not pay the exaggerated "bills" which Miller prepared, nor is the claim made that they did pay them or were asked to pay them.[35]

The so-called "bills" were not, in fact, bills in the sense that they were presented to the carriers for payment. They were actually only a listing of the patients' alleged medical expenses.

None of the witnesses for the carriers or the transit authority testified that they received the reports and bills from the *appellant*.

ALL THE TESTIMONY IN THE RECORD, IN THIS REGARD, CONCLUSIVELY SHOWED THAT THE REPORTS AND BILLS WERE RECEIVED FROM MILLER.[36]

There is no evidence in the record, either hearsay or probative, to establish that it was the appellant who attempted the fraud.

The record undeniably establishes that the fraud was attempted by the attorney Miller, but Miller is not a party herein and the evidence which undeniably establishes Miller's guilt does not support a finding of appellant's alleged guilt.

---

[35] The so-called "bill" to the transit authority (R. 55, f. 164, Exh. 3) stated it was paid by the patient (R. 58, f. 172).

See also report re:

Sadie Cohen (Exh. 5(a), R. 68, f. 203; R. 70-71, ff. 209-213).
Doris Turner (Exh. 5(b), R. 68, f. 204; R. 72-73, ff. 214-218).
George Turner (Exh. 5(c), R. 68, f. 204; R. 73-74, ff. 219, 222).
Gonzales (Exh. 6(a), R. 77, f. 229; R. 78, ff. 232-3).
Morales (Exh. 7(a), R. 79, f. 237; R. 81, f. 241).

[36] Kaminsky bill furnished by attorney Miller—R. 59, f. 176; Exh. 4, R. 60, f. 178; R. 64, f. 192.

Report re Sadie Cohen, Doris Turner and George Turner furnished by attorney Miller—R. 67, f. 200.

Report re Gonzalez received from attorney Miller—Exhs. 6 and 6(a), R. 76, f. 228; R. 77-78, ff. 230-233; R. 76, f. 277.

Report re Morales received from attorney Miller—Exhs. 7 and 7(a), R. 79, f. 237; R. 80-81, ff. 238-243 R. 79, ff. 235-236.

There is no evidence (hearsay or probative) to establish that appellant "submitted" false reports and bills to Miller, as charged. In fact, the hearing sub-committee found, as appellant contended, it was Miller who had prepared the reports (R. 193, f. 579; 20a-21a; *supra*, pp. 11-12).

Not one witness testified that appellant "submitted" false reports and bills to Miller, as charged (R. 44, f. 131; *supra*, p. 11).[38] Nor was appellant found guilty of "submitting" false reports and bills to Miller. He was found guilty of "issuing" (R. 190, f. 570; R. 193, f. 579; R. 194, f. 580).

Not one witness testified that appellant "issued" false reports and bills, as found. The finding is without evidentiary support.

Both the charge of "submitting", and the finding of "issuing", are refuted by the finding that Miller prepared the reports (R. 193, f. 579).

The appellant, therefore, was found guilty without evidence to support the charges and was found guilty of acts not charged, in violation of his constitutional rights. *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91, 33 S. Ct. 185, 186; *Morgan* v. *U. S.*, 304 U. S. 1, 18, 58 S. Ct. 773, 776; *Garner* v. *Louisiana* — U. S. —, 32 S. Ct. 248, 251.

Having been found guilty of acts that were not charged, appellant did not receive adequate notice of the charges allegedly proved against him, in violation of constitutional rules (*Morgan* v. *U. S. supra*, 304 U. S. 1, 18, 58 S. Ct. 773, 776), and conviction upon a charge not made is "sheer denial of due process" (*De Jonge* v. *Oregon*, 299 U. S. 353, 362, 57 S. Ct. 255, 259; *Cole* v. *Arkansas*, 333 U. S. 196, 202; *Powell* v. *Alabama*, 287 U. S. 45, 68, 53 S. Ct. 64; *Hecht* v. *Monaghan*, 307 N. Y. 461, 474).

In the absence of evidence[37] to support the charges, or the findings, appellant was found guilty on suspicion or conjecture, in violation of his constitutional rights (*Bridges* v. *Wixon*, 326 U. S. 135, 149, 156, 65 S. Ct. 1443, 1450,[38] 1453; *U. S.* v. *Zimmerman*, 94 F. S. 22, 25), for speculation cannot take the place of proof. *Moore* v. *Chesapeake & Ohio*, 340 U. S. 573, 578.[39]

(4). *Appellee's hearing tribunal violated the constitutional requirements of an impartial and unprejudiced forum, free from passion, hysteria and other unconstitutional motivation.*

The subject hearing herein was held in a prejudiced, unfriendly and hostile forum, presided over by a judge who was also the accuser (25a: Sec. 6515, subd. 4; *Bender* v. *Board of Regents*, 262 A. D. 627, 30 N. Y. S. 2d 779; *Application of Epstein*, 267 A. D. 27, 44 N. Y. S. 2d 921, 922) and a member of the professional group whose members were affected by its decisions.[39a] *Tumey* v. *Ohio*, 273 U. S. 510, 522.

The subject hearing was held after the judge and prosecutor had consulted together and had predetermined and prejudged both the evidence and the result, in violation of appellant's constitutional right to a fair hearing.[40]

---

[37] It has been held that insufficient evidence is no evidence. *Matter of Case*, 214 N. Y. 199, 203.

[38] "But, where the fate of a human being is at stake the presence of the evil purpose may not be left to conjecture."

[39] "Speculation cannot supply the place of proof".

[39a] "It is unreasonable to let a class judge in its own cause. The delegation of such power to an interested class is repugnant to the due process clause of the Fourteenth Amendment, since an interested group is no proper tribunal for determining what should and what should not fall under the prohibition of the state's police power."

32 Columbia Law Review 83.

[40] Appellee's Rule 17.4, *supra*, p. 9, fn. 3.

Appellee's hearing was held in a wave of public and professional hysteria whipped into frenzied action by the glaring headlines of the newspapers screaming the offenses of 1500 doctors (60a), thus pressuring the grievance committee of physicians into vindicating the medical profession in the eyes of the public by its "lynch" hearing, with the subsequent pre-determined result reflected by the committee's finding of guilt without any probative evidence to support it.

Such a "lynch" atmosphere deprived appellant of his constitutional right to a fair hearing by a tribunal free from passion, hysteria and professional prejudice. *Moore* v. *Dempsey*, 261 U. S. 86, 91; *Snowden* v. *Hughes*, 321 U. S. 1, 8, 64 S. Ct. 397, 401.[41]

(5) *Appellant was unconstitutionally denied a remedy by the court below.*

Appellant had remedies available to him under the law of New York State which were denied to him by the courts below: viz. appellee's finding of guilt without evidentiary support in the record is an arbitrary exercise of power forbidden by state statutory and decisional law; appellee's use of a false exhibit is prohibited by state statutory and decisional law; appellee's hearing before a prejudiced and incompetent tribunal is prohibited by state statutory and decisional law, and the state courts have an equal obligation with the federal courts to uphold appellant's constitutional rights under the federal constitution. *Irvin* v. *Dowd*, 359 U. S. 394, 79 S. Ct. 825.

In *Hilfer* v. *Board of Regents*, 283 N. Y. 304, the court held that strict compliance with the statutory requirements of a unanimous guilty vote by appellee's grievance com-

[41] That revocation was a pre-determined result is shown by the appellee's charges served on appellant (R. 39, l. 116), where the penalty of revocation is stated even before appellant has had the opportunity to defend.

mittee was necessary, but the same court failed to apply the ruling in appellant's favor when appellant proved there was non-compliance with statutory requirements of subd. 4, Section 6515 (27a) of such a unanimous vote when only nine members of the statutorily required ten member committee voted him guilty (R. 197, f. 589; *supra*, p. 13). The vote of 9 members is a nullity when the statute requires the unanimous vote of 10 members. *Hilfer* v. *Board of Regents, supra; Darweger* v. *Staats*, 267 N. Y. 290, 305; *Wichita R.R.* v. *Public Utility Com.*, 260 U. S. 48, 59.

The court below, therefore, failed to provide an available remedy to appellant, thereby violating appellant's constitutional rights under the Fourteenth Amendment. *Irvin* v. *Dowd, supra*, 359 U. S. 394, 79 S. Ct. 825; *Shelley* v. *Kraemer*, 334 U. S. 1; *Wo* v. *Hopkins*, 118 U. S. 356, 373-4.[41a]

(6) *Appellant was denied the equal protection of the laws by appellee's unusually severe punishment.*

In revoking appellant's license, appellee meted out to appellant an unusually severe punishment, far more severe than punishment it had meted out to other licensees for offenses of an unquestionably graver nature, thereby denying appellant the equal protection of the laws.[42] *Shelly*

[41a] In *Wo* v. *Hopkins*, it was held that law applied with an unequal hand is denial of equal protection.

[42] Doctors convicted of crimes involving such offenses as prescribing narcotic drugs in violation of the Public Health Law: *Ray* v. *Board of Regents*, 9 A. D. 2d 560, 189 N. Y. S. 2d 299, 300-301—suspension of license for six months ordered by respondent; *Smigel* v. *Board of Regents*, 15 A. D. 2d 623, 222 N. Y. S. 2d 457—the respondent suspended for six months the license of a dentist on charges of submitting false affidavits of dental services; *Tompkins* v. *Board of Regents*, 299 N. Y. 469, 472—respondent suspended the medical license therein involved for six months for illegally prescribing narcotic drugs; *Genova* v. *Board of Regents*, 272 A. D. 1085, 74 N. Y. S. 2d 729, 730—respondent suspended the medical license therein involved for one year for criminal abortion.

The inequality of treatment based on variation in sentences is denial of the equal protection of the laws. *Neal* v. *Delaware*, 103 U. S. 370.

v. *Kraemer*, 334 U. S. 1, 22; *Wo* v. *Hopkins*, 118 U. S. 356, 367-8, 373-4; *Neal* v. *Delaware*, 103 U. S. 370.

It is not an unreasonable inference that appellee's grievance committee was pressured into applying such a severe penalty by the public and professional hysteria artificially induced by the glaring newspaper headlines (60a) screaming the offenses of 1500 physicians, thus pressuring the grievance committee of physicians into vindicating the profession in the public eye by imposing a vindictive punishment on appellant, one of the first of the physicians to be proceeded against in the freshness of appellee's first prosecutions of the Arkwright investigation's targets.

(7) *Appellant was deprived of the aid of counsel and compelled to testify against himself in a criminal investigation and the fruits of such illegal compulsion were used against him in violation of appellant's constitutional right to due process and the equal protection of the laws.*

Appellant was subpoenaed and unconstitutionally compelled to testify at the Arkwright investigation into crimes involving ambulance chasing, at which time his counsel was excluded from the room while he was compelled to testify (*supra*, p. 8) (*People* v. *Steuding*, 6 N. Y. 2d 214, 216-217; *U. S.* v. *La Vallee*, 270 F. 2d 513, 520, cert. den. 80 S. Ct. 403; *People* v. *Roth*, 11 N. Y. 2d 80; *People* v. *Laino*, 10 N. Y. 2d 161, 169, 170-171; *People* v. *Waterman*, 9 N. Y. 2d 561, 565, 216 N. Y. S. 2d 70, 74; *Schmidt* v. *District Attorney*, 255 A. D. 353, 8 N. Y. S. 2d 787, 788), thus violating appellant's right to the aid of counsel at every stage of the criminal investigation.

He was not informed that he was a target of the investigation, only that he was a witness. *People* v. *Gillette*, 126 A. D. 665, 668, 111 N. Y. S. 133, 135; *People* v. *Florentine*, 276 A. D. 730, 97 N. Y. S. 2d 553, 554.

The fruits of this illegal compulsion were later illegally admitted into evidence at appellee's hearing (R. 109, f.

327; *supra*, p. 8) and unconstitutionally used against appellant. *People* v. *Steuding*, 6 N. Y. 2d 214, 216-217; *People* v. *Rodriquez*, — N. Y. 2d —, decided May 10, 1962.

Appellant was therefore denied due process and denied the equal protection of the laws.

(8) Appellee's findings violated prohibition against double punishment, therefore denying appellant the equal protection of the laws and depriving him of due process.

Appellee's findings (R. 194, ff. 580-1) [43] of violating 2(a) and 2(g) were based on the same alleged acts, thereby violating the prohibition against double punishment, which is based on the doctrine of merger, *People* v. *Jackson*, 2 N. Y. 2d 259, 264. Appellant's constitutional rights were thereby violated.

(9) Appellee's failure to comply with statutory requirements deprived appellant of due process and denied him the equal protection of the laws.

a. Lack of Unanimous Vote

Appellee's grievance committee was required to be composed of ten members (Sec. 6515, subd. 1; 24a).[44]

At the time of the subject hearing and the grievance committee's vote on the hearing subcommittee's findings, the grievance committee was composed of nine members, one member having died November 8, 1959 (R. 197, ff. 589-590; R. 27, f. 81), not being replaced till May 20, 1960 (R. 29, f. 87).

---

[43] R. 194, ff. 580-1:

"We feel that such conduct cannot be condoned and that the issuance of the false and fraudulent bills and medical reports by the respondent, especially in the manner in which it was done, evinced a complete disregard by the respondent of his duties and obligations as a physician and *constitutes the fraudulent practice of medicine and unprofessional conduct*". (Emphasis supplied.)

[44] "Such committee shall consist of ten members * * *."

Therefore, a nine member grievance committee voted appellant guilty (R. 197, f. 589).

The statute required a guilty vote to be by a unanimous vote of a ten member committee (Sec. 6514, subd. 4; 27a)[45], therefore, the vote of a nine member committee is null and void. *Hilfer* v. *Board of Regents*, 283 N. Y. 304, 307, 308; *Darweger* v. *Staats*, 267 N. Y. 290, 305; *Wichita R. R.* v. *Public Utility Com.*, 260 U. S. 48, 59.

In *Hilfer*, the Court of Appeals ruled on that point and held that the vote of nine members of appellee's grievance committee did not meet the statutory requirements of a unanimous ten member vote (at p. 308) and held that the statutory requirements must be strictly pursued or the determination will be void (at p. 308).

The quorum provision in subdivision 9 of Section 6515 is clearly applicable only when the grievance committee sits as a committee of the whole to conduct the hearing of the charges, in lieu of appointing a hearing subcommittee.

There is no provision for a quorum vote by the grievance committee when voting on the hearing subcommittee's findings. This is conclusively established by the Court of Appeals decision in *Hilfer*, *supra*, which rejected a nine member vote, when nine members would have satisfied the quorum requirement, if it was applicable.

b. Proceedings and Determination of Illegally Constituted Committee are Void.

The grievance committee not being validly constituted in compliance with the statutory requirements, from November 8, 1959 to May 20, 1960 (R. 29, f. 87), the com-

---

[45] "If by unanimous vote the practitioner is found guilty * * *." Compare present wording of statute, as changed in 1961:

"If by unanimous vote *of the members present* the practitioner is found guilty * * *." (Italicized matter is new.) The amendment supports appellant's contentions.

mittee's proceedings were null and void during that period [46], and the grievance committee's vote of guilty was null and void. *Hilfer* v. *Board of Regents, supra; Darweger* v. *Staats, supra; Wichita R. R.* v. *Public Utility Com., supra.*

A void determination binds no one (*Matter of Dey* v. *Howland Co.*, 224 N. Y. 30, 39), and authority ought not be required for the fundamental proposition that an illegally constituted tribunal lacks jurisdiction of the subject matter, which jurisdiction cannot be conferred upon the tribunal even with the assent (or even participation) of the parties—and the lack of subject matter jurisdiction may be raised at any time.

Therefore, the revocation of appellant's license violates due process and deprives him of the equal protection of the laws.

c. Attorney General's Determination to Prosecute Nullifies Proceedings.

Appellee's Rule 17.4 (*supra*, p. 9), provides that the Attorney General shall determine if the charges are to be prosecuted.

This is not in compliance with the statutory requirement that the grievance committee shall determine if the charges are to be tried (Sec. 6515, subd. 4; 26a).

Since the determination to prosecute was made by the Attorney General pursuant to Rule 17.4, when the statute required the grievance committee to make the determination, the proceedings are not in compliance with the statute, and the appellee's determination is null and void. *Hilfer* v. *Board of Regents, supra,* 283 N. Y. 304, 308, 309;

---

[46] This includes the charges served on appellant on March 1, 1960 (R. 29, f. 117), and the hearing on March 23, 1960 (R. 189, f. 565). Possibly, the committee's vote to prosecute the charges may have been during its period of illegal constitution and thus be void, as well.

Darweger v. Staats, supra; Wichita R. R. v. Public Utility Com., supra.

Therefore, the revocation of appellant's license deprives him of due process and denies him the equal protection of the law.

(10) Due Process is Lacking Where, as Here, the One Who Decides Did Not Hear the Evidence.

It has frequently been held that due process is lacking and a fair hearing has not been given if the one who decides the matter did not hear the evidence.

It was so stated by this Court in *Morgan v. United States*, 298 U. S. 468, 480-481, 56 S. Ct. 906, 911, where the Court stated:

> "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

The record herein will demonstrate (R. 204) that the respondent voted on September 30, 1960, to accept the Regents' Committee on Discipline's recommendation that petitioner's license be revoked, and nowhere does it appear that, in accepting this recommendation, the Board of Regents made any study of the evidence or reviewed the matter in any way.

In a somewhat similar situation, involving another administrative agency of the State of New York, the New York State Supreme Court said:

> "It is the function of the respondent to exercise its discretion on the basis of evidence in the record, not on a resume and recommendation of the hearing officer. If the determination is based merely on the resume and report of the hearing officer it is in fact a determination of the hearing officer and not of the respondent. The statute does not permit the respondent to delegate to a subordinate its powers

to approve or reject applications." *O'Dea's Bar and Restaurant, Inc.* v. *New York State Liquor Authority*, 201 N. Y. S. 2d 340, 342 (S. Ct., Sp. Term, Nassau County, 1960).

Conclusion

Beneficent aims and/or a small degree of unconstitutionality do not justify violations of constitutional precepts. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, —; 56 S. Ct. 855, 864, 866; *Engel* v. *Vitale*, — U. S. —, decided June 25, 1962.

The court is asked to take judicial notice of the papers on file in this court in *Wassermann* v. *Board of Regents*, October Term, 1962, No. 227, petition for writ of certiorari (filed July 5, 1962).

It is respectfully submitted, therefore, that the foregoing presents appealable substantial federal questions for this court to review and that this court has jurisdiction of the appeal herein.

Wherefore, appellant respectfully prays for an order of this Court noting probable jurisdiction so that the appeal herein may be heard, and, on being heard, appellant respectfully prays for reversal of the judgment of the Court below, and for such other and further relief as may be just.

Respectfully submitted,

JACOB RASSNER,
Counsel for Appellant.